No. 08-890

IN THE

Supreme Court of the United States

OSCAR DIAZ, *et al.*,

Petitioners,

v.

DAVID PATERSON, Governor of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does New York's notice-of-pendency statute comply with the Due Process Clause of the Fourteenth Amendment, when (1) a notice of pendency merely informs the public about a lawsuit claiming an interest in property, but does not itself create a new property interest, and (2) the statute limits the filing of notices and provides a property owner an opportunity to cancel a notice even apart from defending the lawsuit on the merits?

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STATEMENT

1. Under article 65 of the New York Civil Practice Law and Rules ("C.P.L.R."), a plaintiff pursuing a lawsuit that "would affect the title to, or the possession, use or enjoyment of, real property" may file a notice of pendency with respect to that property.[1] C.P.L.R. 6501. If the notice is properly filed, the outcome of that lawsuit will bind any "person whose conveyance or incumbrance is recorded after the filing of the notice." *Id.*

a. "[T]he notice of pendency shall be filed in the office of the clerk of any county where property affected is situated." *Id.* 6511(a). The notice must be filed with the related complaint (unless the complaint "has already been filed in that county," *id.*), so that "any prospective purchaser of the property can immediately review the complaint to determine whether the plaintiff's claims may actually constitute a cloud on the title." 13 Jack B. Weinstein et al., *New York Civil Practice: CPLR* ¶ 6511.01, at 65-35 (2d ed. 2009) (footnote omitted). The notice must state "the names of the parties to the action, the object of the action and a description of the property affected." C.P.L.R. 6511(b). The notice "is effective only if, within thirty days after filing, a summons is served upon the defendant" or publication of the summons pursuant to a court order is completed. *Id.* 6512.

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[1] Although courts often use the terms interchangeably, "[t]he term '*lis pendens*' properly refers to the common-law doctrine, while the term 'notice of pendency' is the statutory device which supercedes that doctrine." 13 Jack B. Weinstein et al., *New York Civil Practice: CPLR* ¶ 6501.04, at 65-7 (2d ed. 2009) (footnote omitted).

b. "[A]ny person aggrieved" by a notice of pendency may file a motion to cancel the notice. *Id.* 6514. A court "shall direct" the cancellation of a notice if the summons has not been timely served; if the related lawsuit has been "settled, discontinued or abated"; or if final judgment has been entered against the plaintiff and the plaintiff has either failed to obtain a stay or has allowed the time to appeal to expire. *Id.* 6514(a). A court must also cancel a notice of pendency if the related lawsuit does not (as required by C.P.L.R. 6501) "affect the title to, or the possession, use or enjoyment of, real property"—a standard that is construed narrowly. *See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 321-22, 476 N.E.2d 276, 281-82 (1984). Finally, even without a court order, a county clerk "shall" cancel a notice of pendency if the parties stipulate to cancellation or if no parties appear in the related lawsuit. C.P.L.R. 6514(d), (e).

In addition to these mandatory grounds for cancellation, a court "may" cancel a notice "if the plaintiff has not commenced or prosecuted the action in good faith," *id.* 6514(b)—for example, if the plaintiff files a notice "for an ulterior purpose," *Nastasi v. Nastasi*, 26 A.D.3d 32, 41, 805 N.Y.S.2d 585, 593 (2005), or "engage[s] in dilatory tactics," *551 West Chelsea Partners LLC v. 556 Holding LLC*, 40 A.D.3d 546, 548, 838 N.Y.S.2d 24, 25 (2007). A court may also "evaluate the claim's legal sufficiency, and if the claim is found legally insufficient and is dismissed, the notice of pendency should be canceled." 13 Weinstein et al., *supra*, ¶ 6501.05, at 65-11 (footnote omitted).

Finally, in all actions except those seeking mortgage foreclosures, partition, or dower, a property owner may move to substitute an undertaking (*i.e.*, a bond) for the notice of pendency. C.P.L.R. 6515. Such an undertaking may lead to cancellation of the notice in two circumstances. First, the notice may be cancelled if "adequate relief can be secured to the plaintiff" by the undertaking. *Id.* 6515(1). Second, even if the property owner's undertaking is inadequate, "the court can still cancel the [notice of pendency] if . . . the plaintiff does not respond with the plaintiff's own undertaking to protect the defendant." David D. Siegel, *New York Practice* § 336, at 538 (4th ed. 2005) (citing C.P.L.R. 6515(2)). In other words, a property owner's offer to post even an insufficient bond may lead to the cancellation of a notice of pendency unless the plaintiff agrees to "indemnify [the owner] for the damages that [the owner] may incur if the notice is not cancelled." C.P.L.R. 6515(2).

c. A court that cancels a notice of pendency on any of the grounds listed in C.P.L.R. 6514—*e.g.*, the property owner prevailed in the related lawsuit; the plaintiff failed to comply with certain procedural requirements; or the plaintiff's lawsuit was in bad faith—"may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." C.P.L.R. 6514(c). In addition, an aggrieved property owner may sue the plaintiff for malicious prosecution or abuse of process. *See* 13 Weinstein et al., *supra*, ¶ 6514.11, at 65-71 nn.3-4.

2. This case originated as three separate lawsuits filed in the United States District Court for the Southern District of New York, each of which alleged that article 65 violates the Due Process Clause of the Fourteenth Amendment. Although the underlying facts of each case are distinct, their procedural histories are intertwined.

a. In 1992, Bronx resident Oscar Diaz obtained a $65,000 mortgage on his home from Churchill Mortgage Investment Corporation. Pet. App. 52a-53a. After Diaz fell behind on his payments, Churchill initiated foreclosure proceedings in 2003. "At the same time, Churchill filed a notice of pendency . . . against Diaz's home with the clerk of Bronx County." *Id.* at 53a.

Instead of petitioning a state court to remove the notice, *id.*. at 53a, Diaz filed a putative class action in federal court alleging that article 65 violates the federal Due Process and Equal Protection Clauses. *Id.* at 10a. The complaint named as defendants the Governor, Attorney General, and Comptroller of New York State; the Bronx County clerk with whom the notice was filed; and Churchill, the mortgage company and state-court plaintiff. *Id.* at 10a, 52a-53a. Churchill apparently was never served and has not appeared. *Id.* at 52a n.1. The complaint sought injunctive and declaratory relief and damages. *Id.* at 54a.

In 2005, Diaz notified the district court that he had negotiated a sale of his home to satisfy the mortgage, that Churchill's foreclosure action would be dismissed, and that the notice of pendency would accordingly be cancelled. *Id.* at 11a.

b. In 1987, Jehed Diamond and her husband jointly purchased a home in Delaware County, New York. *Id.* at 8a, 36a. After the couple separated, the husband conveyed the title and deed of the home to Diamond. *Id.* at 36a. Several months later, Diamond arranged to sell the property. *Id.* at 8a, 37a. Before the scheduled closing, however, Diamond and her husband were sued in state court by Christopher Jones, who alleged that he had loaned Diamond's husband $90,000 in reliance on a promise to repay the loan from the proceeds of the sale of the house. *Id.* at 37a. To support his allegations, Jones attached to his summons a promissory note that had been signed by Diamond's husband a month before the husband conveyed the home to Diamond. J.A. 52-54. Jones also filed a notice of pendency against the house with the clerk of Delaware County. Pet. App. 37a.

Diamond agreed to place $100,000 from the sale of the house in escrow pending the outcome of Jones's lawsuit. *Id.* Under this escrow agreement, the notice of pendency was canceled, and the sale closed on schedule. *Id.* at 9a.

Diamond then filed a putative class action in federal district court alleging that article 65 violates the Due Process and Equal Protection Clauses of the federal and New York constitutions. *Id.* at 10a. The named defendants were the Governor, Attorney General, and Comptroller of New York State; the Delaware County clerk with whom the notice of pendency was filed; and Jones, the state-court plaintiff. *Id.* The complaint sought injunctive and declaratory relief and damages. *Id.*

Almost two years after the notice of pendency was canceled, Diamond reached a settlement in Jones's state-court lawsuit (J.A. 296-297) under which she agreed to pay Jones most of the money in escrow. Pet. App. 9a.

c. In 1996, Joseph Betesh exercised a power of attorney to transfer his mother's house to himself. Pet. App. 38a. In August 2004, Betesh reached an agreement on a $60,000 home equity loan from a housing program allegedly affiliated with the "New York City Department of Housing and Urban Development."[2] *Id.*; *see also* J.A. 236.

That same month, Betesh's brother Abraham sued Betesh in state court, alleging that the 1996 transfer was improper because it had been made pursuant to an invalid power of attorney. Pet. App. 38a-39a. Abraham also filed a notice of pendency on the house with the Queens County clerk. *Id.* at 11a, 39a. After learning of the lawsuit between the brothers, the housing program informed Betesh that it could no longer provide the $60,000 home equity loan. *Id.* at 39a. In March 2005, Betesh filed in state court a motion to vacate the notice and to dismiss his brother's claims. *Id.*

In May 2005, Betesh filed his federal complaint, alleging a violation of the federal Due Process Clause. *Id.* at 11a-12a. Like Diaz and Diamond, Betesh sued the Governor, Attorney General, and Comptroller of New York State; he also named as defendants the Queens County clerk and his brother Abraham, the state-court

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[2] No entity by this name exists.

plaintiff. *Id.* at 10a, 12a. The complaint sought injunctive and declaratory relief and damages. *Id.*

After Betesh filed his federal complaint, his brother's state court action was dismissed, and the notice of pendency was canceled. *Id.* at 12a.

d. All three federal cases were assigned to the same district court judge. The district court initially dismissed the *Diamond* complaint on *Rooker-Feldman* grounds and the *Diaz* complaint for failure to state a claim. Pet. App. 12a-13a, 77a. Both Diamond and Diaz appealed. The Second Circuit remanded the *Diamond* case in light of this Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), which limited the scope of the *Rooker-Feldman* doctrine, and allowed Diaz to withdraw his appeal without prejudice to reactivation after a final judgment in the remanded *Diamond* case. *Id.* at 14a.

In the meantime, Betesh had filed his federal complaint. *Id.* at 11a, 14a. The district court consolidated *Betesh* with the remanded *Diamond* case and ultimately dismissed both complaints for failure to state a claim. *Id.* at 14a, 49a-50a. On appeal, the Second Circuit reactivated the *Diaz* case and considered all three lawsuits together. *Id.* at 14a.

3. In a unanimous opinion, the Second Circuit affirmed the district court's decisions and rejected petitioners' due process claims. *Id.* at 1a-32a. Without deciding whether a notice of pendency effects a "'significant taking of property'" that gives rise to due process rights, *id.* at 17a (quoting *Fuentes v. Shevin*,

407 U.S. 67, 86 (1972)), the court held that New York's statute provides "all the process that is due" under *Connecticut v. Doehr*, 501 U.S. 1 (1991). Pet. App. 17a.

Doehr addressed a due process challenge to Connecticut's prejudgment attachment statute, which allowed plaintiffs with claims unrelated to real property—such as the assault-and-battery claim in *Doehr*—to attach real property owned by defendants. 501 U.S. at 4-5. Connecticut's attachment statute thus allowed plaintiffs to create a new property interest that they would otherwise have no basis to assert. This Court invalidated Connecticut's statute after balancing the private interests of property owners, the risk of erroneous deprivation of their property rights, and the interests of the State and plaintiffs in the attachment procedure. *Id.* at 11-18.

Using these same three factors, the court of appeals here upheld article 65. Under the first *Doehr* factor, the court evaluated the effect of the notice of pendency on a property owner's private interests. Although petitioners had alleged that notices of pendency impaired the marketability of their property, the court concluded that this factor did not support petitioners' position as decisively as it had in *Doehr*. Pet. App. 21a-23a. The court noted that a notice of pendency is "one of the 'less restrictive' means of protecting a disputed property interest," since an owner "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it." *Id.* at 22a. The court found that notices of pendency had a lesser effect on private interests than attachments because of article 65's limited scope: it is strictly

interpreted as allowing a notice of pendency only when "'the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.'" *Id.* (quoting C.P.L.R. 6501). Finally, the court questioned the plausibility of petitioners' allegations of nonmarketability, *id.* at 22a n.6, although it ultimately assumed the truth of these allegations.

The second *Doehr* factor considers the risk of erroneous deprivation and the value of additional statutory safeguards. The court found that "the risk of erroneous deprivation is minimal" under New York's notice-of-pendency procedure, since that procedure "is available only to claimants asserting a defined interest in the property." *Id.* at 23a. The court observed that the notices filed against petitioners here were related to lawsuits "involv[ing] relatively 'uncomplicated matters that lend themselves to documentary proof.'" *Id.* (quoting *Doehr*, 501 U.S. at 14). In addition, the court found the risk of error to be further reduced by the procedural safeguards in article 65, which include a requirement of notice to property owners and a right to a court hearing. *Id.* at 24a-26a.

Finally, under the third *Doehr* factor, the court considered the interests of the State and of the claimants who had filed the notices of pendency. The court found that the State had a significant interest in article 65 because its procedures "protect[] the court's power over the disposition of [disputed] property" and thus increase the public's confidence in the effectiveness of the judicial process. *Id.* at 27a-28a. In addition, the court found a significant interest in those who filed notices of pendency, since in New York the filers

necessarily claim an "existing interest[] in the realty at issue." *Id.* at 27a.

After balancing the three *Doehr* factors, the court concluded that "[i]n view of the procedural safeguards of Article 65—in particular its narrow application to pre-existing claims affecting the property, and its provisions for post-deprivation notice and hearing—the statute satisfies the Due Process Clause of the Fourteenth Amendment." *Id.* at 28a. Accordingly, the court affirmed the dismissal of petitioners' as-applied and facial challenges. *Id.*

The court declined to consider petitioners' contention that article 65 denies them their right of access to the courts, finding that this issue was "raised for the first time on appeal." Pet. App. 15a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. In addition, several features of this litigation make it an inappropriate vehicle for resolving petitioners' constitutional claims. This Court's review is therefore not warranted.

A. The Decision Below Does Not Conflict With Any Precedents Of This Court Or The Courts Of Appeals.

Petitioners have failed to identify any significant split in authority over the constitutionality of notice-of-pendency procedures. The decisions of both this Court

and the courts of appeals have uniformly found that notices of pendency do not implicate significant property interests and that state-law procedures substantially similar to article 65 afford property owners all the process they are due. The issue therefore does not warrant this Court's review at this time.

1. To state a due process claim, petitioners must first demonstrate that they were deprived of a significant property interest. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). As the court below explained, the filing of a notice of pendency does not formally affect any of the incidents of property ownership; an owner "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it." Pet. App. 22a (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14-15 (1984)). Nor does a notice of pendency vest in the filer any additional rights to the contested property. Instead, the only legal effect of a notice of pendency is to provide information to the public about a pending lawsuit that may affect ownership rights in the property at issue. *See Doehr*, 501 U.S. at 29 (Rehnquist, C.J., concurring); *United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007); 13 Weinstein et al., *supra*, ¶ 6501.00, at 65-4.

Because of these features, the courts of appeals that have addressed the issue have unanimously held that the filing of a notice of pendency does not implicate the Due Process Clause. *See Jarvis*, 499 F.3d at 1203; *United States v. Register*, 182 F.3d 820, 837 (11th Cir. 1999); *Aronson v. City of Akron*, 116 F.3d 804, 811-12 (6th Cir. 1997); *see also Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1334-37 (3d Cir. 1982) (Hunter, J., concurring);

United States v. Jewell, 538 F. Supp. 2d 1087, 1093 (E.D. Ark. 2008); *United States v. Property Identified As Lot Numbered 718*, 983 F. Supp. 9, 11 (D.D.C. 1997); *Darr v. Muratore*, 143 B.R. 973 (D.R.I. 1992); *United States v. Rivieccio*, 661 F. Supp. 281, 297 (E.D.N.Y. 1987); *Batey v. Digirolamo*, 418 F. Supp. 695, 697 (D. Haw. 1976). With one exception, every published state court decision to consider the issue has also agreed. *See Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 563-66, 420 N.E.2d 343, 347-48 (1981); *George v. Oakhurst Realty, Inc.*, 414 A.2d 471, 474 (R.I. 1980); *Empfield v. Superior Court*, 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375, 377 (Cal. Ct. App. 1973). The one exception is the Connecticut Supreme Court, which held in *Kukanskis v. Griffith*, 180 Conn. 501, 509-11, 430 A.2d 21, 25 (1980), and *Williams v. Bartlett*, 189 Conn. 471, 476-79, 457 A.2d 290, 293-94 (1983), that the filing of a notice of pendency affected significant property interests. But that court ultimately held that Connecticut's statute provided all the process that was due, *see Williams*, 189 Conn. at 479-81, 457 A.2d at 294-95, and thus there is no square split on the constitutional question.

2. This Court's precedents have likewise acknowledged that a notice of pendency does not affect significant property interests. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 47-48 (1993), the Court held that the ex parte seizure of property used to commit drug offenses violated the Due Process Clause. As an alternative to such seizures, the Court suggested that "filing a notice of *lis pendens* as authorized by state law"—which in that case would not have required prior notice or a hearing, *see* Haw. Rev. Stat. § 634-51 (1985)—would protect the government's

interests. 510 U.S. at 58; *see also United States v. Real Property Known and Numbered as 429 S. Main St.*, 52 F.3d 1416, 1420 (6th Cir. 1995) (noting that, under *Good*, "the government could file a *lis pendens* . . . without a predeprivation hearing"). Analogously, this Court has recognized in the takings context that the mere filing of a notice of pendency does not impair property interests "in any constitutionally significant way," even if the notice "reduced the price that the land would have fetched." *Kirby Forest Indus.*, 467 U.S. at 15, 16.

Petitioners' primary argument for granting certiorari is that the decision below "directly conflicts" with *Doehr*, which struck down Connecticut's prejudgment attachment statute. Pet. 20. But as Chief Justice Rehnquist recognized in *Doehr* itself, the purely informational effect of a notice of pendency contrasts sharply with a prejudgment attachment. *See* 501 U.S. at 29 (Rehnquist, C.J., concurring). An attachment creates a lien in the subject property—a property right that did not previously exist—while a notice of pendency does not. *Compare* 12 Weinstein et al., *supra*, ¶ 6216.05, at 62-170, *with* 13 *id.* ¶ 6501.11, at 65-24. The state-court plaintiff in *Doehr*, for instance, had brought only an assault-and-battery claim, and thus had no pre-existing interest in the defendant's property before he filed the attachment. *See* 501 U.S. at 5. By contrast, a notice of pendency—rather than *creating* a plaintiff's interest in real property—merely *reflects* a property right that has been asserted or established in the collateral lawsuit.[3] Accordingly,

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[3] The federal courts have acknowledged this distinction in bankruptcy proceedings, in which attachments receive far greater protection than mere notices of pendency. (Cont'd)

any harm that property owners may suffer derives not from the notice of pendency itself, but from the collateral lawsuit, whose outcome binds all subsequently recorded purchasers and encumbrancers. *See* C.P.L.R. 6501. Because of the fundamental difference between an attachment and a notice of pendency, the court of appeals' decision here is entirely consistent with *Doehr*.

Article 65's historical provenance confirms that, unlike the attachment at issue in *Doehr*, a notice of pendency itself affects no property interests. Notices of pendency originated from the well-established common-law doctrine of lis pendens, *see 5303 Realty Corp.*, 64 N.Y.2d at 318, 476 N.E.2d at 279, which presumed that *all* transferees, however innocent, had constructive notice of any legal action against the property in question, *see* 13 Weinstein et al., *supra*, ¶ 6501.01, at 65-4 to 65-5. Today, New York law—like the law of most other states—no longer presumes constructive notice from the mere filing of a lawsuit. Instead, article 65 "substantially reduced the harshness of the common-law rule," *In re Sakow*, 97 N.Y.2d 436,

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(Cont'd)

Compare, e.g., In re Leonard, 125 F.3d 543, 545 (7th Cir. 1997) (bankruptcy trustee can ignore previously filed notice of pendency in avoiding pre-petition claims), *with In re Wind Power Systems, Inc.*, 841 F.2d 288, 292-93 (9th Cir. 1988) (bankruptcy trustee cannot ignore previously filed attachment in avoiding pre-petition claims). *See also Green Hill Corp. v. Kim*, 842 F.2d 742, 744 (4th Cir. 1988) (previously filed notice of pendency, in the absence of a pre-petition entry of judgment, did not entitle plaintiff to relief from automatic bankruptcy stay).

441, 767 N.E.2d 666, 669 (2002), by binding subsequent purchasers only if the plaintiff had recorded notice of the pending lawsuit in a central registry. *See* C.P.L.R. 6501, 6511; *Da Silva v. Musso*, 76 N.Y.2d 436, 439, 559 N.E.2d 1268, 1268-69 (1990); *5303 Realty Corp.*, 64 N.Y.2d at 319, 476 N.E.2d at 280. But article 65 neither originated nor exacerbated the burdens faced by owners, such as petitioners, whose property was the subject of legal contest. Under the common law predating article 65, a lawsuit asserting an interest in real property *already* hindered the ability of property owners to alienate or encumber their property.

3. Even if notices of pendency triggered due process protections, unanimous appellate authority confirms the constitutional adequacy of notice-of-pendency procedures similar to those contained in article 65. This Court approved of such procedures when it dismissed "for want of [a] substantial federal question," *Bartlett v. Williams*, 464 U.S. 801 (1983), an appeal from the Connecticut Supreme Court's decision in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290 (1983). *See Hicks v. Miranda*, 422 U.S. 332, 343-344 (1975) (holding that such dismissals are decisions on the merits). The Connecticut court evaluated a notice-of-pendency statute that was substantially similar to New York's (Pet. App. 72a-73a), and concluded that the statute "meets the minimum requirements of procedural due process under the fourteenth amendment." 189 Conn. at 480-81, 457 A.2d at 294-95. The Third Circuit has reached the same conclusion in evaluating New Jersey's statute, which bears an even greater similarity to article 65. *See Chrysler Corp.*, 670 F.2d at 1327-31.

That article 65 derives from a well-established common-law tradition also supports its constitutionality under this Court's precedents. *See Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."); *Hurtado v. California*, 110 U.S. 516, 528 (1884) ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) ("If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process."). By contrast, the attachment procedure invalidated in *Doehr* was "a remedy unknown at common law." *Doehr*, 501 U.S. at 16.

None of the cases cited by petitioners support their contention that there is a split of appellate authority about the constitutional question. Most of petitioners' cases do not involve notices of pendency at all but rather other devices such as liens or attachments. *See* Pet. 22-23. Given the inherently fact-based test for procedural due process claims, *see Doehr*, 501 U.S. at 10; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), these cases are consistent with the uniform precedents upholding statutes like article 65.

Petitioners have cited only two trial-level rulings that do involve notices of pendency, but neither is apposite here. In *United States v. Property Identified As Lot Numbered 718*, 20 F. Supp. 2d 27 (D.D.C. 1998) (cited at Pet. 22-23), the court did not rule on the

constitutional question at issue here, instead concluding that, under the unusual facts of that case, the government had committed an "abuse of . . . process" by using a notice "as a bargaining chip in negotiations about the [property's] sale proceeds and generally to settle this case." *Id.* at 35. In *Feingold v. Desarrollos Modernos S.E.*, No. 93-1817, 1994 U.S. Dist. LEXIS 15389 (D.P.R. May 19, 1994) (cited at Pet. 21 n.7), the court issued an unpublished disposition in which the discussion of the constitutional claim was dicta, as the court had already held that the notice violated Puerto Rico law. *See id.* at *7-*9. Thus, no significant federal or state authority conflicts with the court of appeals' decision here, which faithfully applied *Doehr*'s analysis of attachments to the quite different context of notices of pendency.

B. The Court Of Appeals Properly Held That New York's Notice-Of-Pendency Statute Provides All The Process That Is Due.

The court of appeals assumed for argument's sake that notices of pendency implicate significant property interests, but held that article 65 provides property owners with all the process they would be due under *Doehr*. *See* Pet. App. 21a-28a. The court correctly found important distinctions between Connecticut's attachment statute and New York's notice-of-pendency statute, and it accordingly held that the three factors considered in *Doehr* support the constitutionality of article 65.

1. The first *Doehr* factor is "the private interest that will be affected by the prejudgment measure."

501 U.S. at 11. Petitioners claim that notices of pendency prevented them from alienating or otherwise encumbering their properties, Pet. 26, and the court below accepted these allegations to "conclude that the first *Doehr* factor supports [petitioners'] position, although not so decisively as in *Doehr*." Pet. App. 22a-23a. The court correctly minimized petitioners' alleged harms. As explained above, unlike the harm caused by an attachment, any harm suffered by a property owner from a notice of pendency stems not from the notice itself but rather from the collateral lawsuit involving the property. In effect, then, petitioners' alleged private interests reduce to interests in concealing the existence of pending litigation or transferring their property despite competing ownership claims. Even if such interests were legitimate, which as the court of appeals noted is questionable (Pet. App. 22a n.6), they would be less weighty than the property owner's right in *Doehr* to sell property that had no inherent relationship to a personal-injury lawsuit.

2. The second *Doehr* factor is "the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards." *Doehr*, 501 U.S. at 11. The court below properly found that the procedural protections of article 65 create a significantly lower risk of error than the attachment procedures in *Doehr*. Pet. App. 23a-26a.

a. First, article 65 imposes several procedural requirements for filing a notice of pendency, *see* C.P.L.R. 6501-6512, which courts strictly enforce. *See 5303 Realty Corp.*, 64 N.Y.2d at 320-21, 476 N.E.2d at 281. A plaintiff who fails to comply with these requirements at the outset

forfeits the right to file any further notices on the property at issue. *See Israelson v. Bradley*, 308 N.Y. 511, 515-16, 127 N.E.2d 313, 315 (1955); *see also 5303 Realty Corp.*, 64 N.Y.2d at 320, 476 N.E.2d at 281 ("[A] subsequent, amended complaint cannot be used to justify an earlier notice of pendency.").

Petitioners nevertheless contend that this Court should impose another threshold procedure: service of the notice of pendency itself. *See* Pet. 28-29. But article 65 already mandates that plaintiffs notify defendants by serving or publishing the summons within thirty days, *see* C.P.L.R. 6512, and petitioners offer no explanation of the "probable value" of their proposed "additional . . . safeguard[ ]." *Doehr*, 501 U.S. at 11. The sole purpose of a notice of pendency is to provide notice of a pending lawsuit. *See* 13 Weinstein et al., *supra*, ¶ 6501.11, at 65-23. But the mandatory service or publication of summons already notifies owners of the lawsuits against their property, and, because notices of pendency are recorded, *see* C.P.L.R. 6511(c)-(d), property owners notified of a summons can easily check with the county clerk's office to determine whether a notice has been filed.

In any event, petitioners have not explained how they were prejudiced by the plaintiffs' failure to serve notices of pendency here. Both Diamond and Betesh received actual notice of their respective notices of pendency within a few weeks of service of the summons, and both timely petitioned the state courts to cancel the notices. *See* Pet. App. 36a-39a; J.A. 36-37. And because Diaz never asked for the notice of pendency to be removed, even after he had undisputed knowledge

of it, *see* Pet. App. 53a, it is not clear how he could have been helped by the additional service of the notice.

b. Second, property owners who are aggrieved by a notice of pendency may move to cancel the notice on a variety of grounds. *See* C.P.L.R. 6514. While courts do not resolve the merits of the lawsuit in determining whether to cancel a notice (Pet. App. 24a-25a), they may still evaluate the "legal sufficiency" of the plaintiff's claims, 13 Weinstein et al., *supra*, ¶ 6501.05, at 65-11.

That evaluation is aided here by a crucial distinction between article 65 and the procedures at issue in *Doehr*. This Court found a substantial risk of erroneous deprivation in Connecticut's attachment procedures because "the assault and battery claim at issue [t]here" did not "lend [itself] to accurate *ex parte* assessment[ ] of the merits." 501 U.S. at 17. By contrast, the Court expressly noted that accurate merits assessments were more likely for "disputes between debtors and creditors," which often "involve[] uncomplicated matters that lend themselves to documentary proof." *Id.* at 15, 17. Here, the court below observed that petitioners were involved in just such disputes: the notices of pendency "were filed by creditors whose claims were pre-existing, readily quantifiable, and largely susceptible to proof by documentary evidence." Pet. App. 23a. The plaintiff in Diamond's case filed with his state-court complaint a promissory note signed by Diamond's husband (J.A. 54); the plaintiff in Diaz's case relied upon a formal mortgage; and Betesh's brother cited the documents that Betesh had relied upon for the earlier transfer. *See* Pet. App. 23a. The state courts here thus had before them far more than the "skeletal affidavit" in *Doehr*, 501 U.S. at

14, and could conduct a more searching inquiry into the legal sufficiency of the plaintiffs' claims.

Petitioners object (Pet. 21, 29) that article 65's hearing does not require plaintiffs to prove a likelihood of success on the merits, as do New York's and Connecticut's attachment laws. *See* C.P.L.R. 6223(b); Conn. Gen. Stat. § 52-278e(e). The court below properly observed that *Doehr* did not mandate such a standard. *See* Pet. App. 26a. In any event, petitioners have not shown how such a hearing would have helped them. In both New York and Connecticut, plaintiffs seeking attachments need not prove the merits of their claims; they need establish only a prima facie or bona fide case supported by facts. *See TES Franchising, LLC v. Feldman*, 286 Conn. 132, 137, 943 A.2d 406, 411 (2008); *Olbi USA, Inc. v. Agapov*, 283 A.D.2d 227, 724 N.Y.S.2d 839 (2001). The courts of both States have held that documentary evidence is sufficient to make such a showing. *See TES Franchising*, 286 Conn. at 144-45, 943 A.2d at 415-16; *Considar, Inc. v. Redi Corp. Establishment*, 238 A.D.2d 111, 112, 655 N.Y.S.2d 40, 41 (1997). Here, the plaintiffs in all of petitioners' cases presented just such evidence in support of their state-law claims. *See* Pet. App. 23a, 73a. It seems likely, then, that they would have satisfied even the heightened showing that petitioners demand. This is particularly true for Diaz: the mortgage company's state-law claims were supported by clear documentary evidence (namely, the mortgage), but Diaz himself admits that his defenses and counterclaims, by contrast, "were not simple." Pet. 14.

c. Third, although a majority of this Court has never required the posting of a bond in connection with prejudgment remedies, *see* Pet. App. 26a, article 65 does provide an adequate bond procedure to relieve property owners of notices of pendency. *See* C.P.L.R. 6515.

Petitioners object that article 65 does not require plaintiffs *alone* to post a bond when filing a notice of pendency. Pet. 30-31. But this objection overlooks the actual operation of C.P.L.R. 6515. Although that provision requires a property owner to post a bond in the first instance, the notice of pendency may be canceled unless the plaintiff then responds with his own bond—even if the property owner's bond is inadequate as a substitute for the property in dispute. *See* C.P.L.R. 6515(2); Siegel, *supra*, § 336, at 538 (noting that C.P.L.R. 6515(2) is "a kind of lever the defendant can pull to try to make the plaintiff furnish an undertaking in return"). When a property owner invokes this mutual-bonding procedure, the court has discretion to determine the relative amount of the two bonds, and in making that determination it may consider the plaintiff's likelihood of success on the merits. *See Weiss v. Alard, L.L.C.*, 150 F. Supp. 2d 577, 583 (S.D.N.Y. 2001); *Pix Furniture, Inc. v. Loew's Theatres & Realty Corp.*, 131 Misc. 2d 517, 519, 500 N.Y.S.2d 959, 961 (Sup. Ct. 1986) ("[T]he court may consider the merits, the good faith of the plaintiff and the possibility of his being successful on the facts which are presented to the court."), *aff'd*, 129 A.D.2d 1018, 513 N.Y.S.2d 648 (1987). Thus, as a practical matter, C.P.L.R. 6515 adequately protects property owners against notices of pendency filed in conjunction with patently unmeritorious lawsuits.

d. Fourth, article 65 minimizes errors by exposing plaintiffs to liability if a notice of pendency is canceled. A court "may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." C.P.L.R. 6514(c). And property owners may also sue plaintiffs for malicious prosecution or abuse of process. *See* 13 Weinstein et al., *supra*, ¶ 6514.11, at 65-71 nn.3-4.

e. Finally, outside of article 65's procedures, property owners who dispute a notice of pendency can always defend themselves on the merits against the plaintiffs' claims and seek cancellation of the notice after prevailing.

3. The third *Doehr* factor considers the interests of the government and of the plaintiff who filed the notice of pendency. *Doehr*, 501 U.S. at 11.

As the court below found (Pet. App. 27a-28a), article 65 serves a crucial state interest not directly present in *Doehr*: it "assure[s] that a court retain[s] its ability to effect justice by preserving its power over the property." *5303 Realty Corp.*, 64 N.Y.2d at 319, 476 N.E.2d at 280. By contrast, "[i]f the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, pendente lite, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined." *Chrysler Corp.*, 670 F.2d at 1329. Petitioners do not challenge this conclusion as a general matter, asserting only that New York has no "legitimate interest" in "the features of [article 65] that petitioners challenge." Pet. 31. But "the specific statutorily

prescribed mechanisms for implementing this provisional remedy . . . were designed with a view toward balancing the interests of the claimant in the preservation of the status quo against the equally legitimate interests of the property owner in the marketability of his title." *Da Silva*, 76 N.Y.2d at 442, 559 N.E.2d at 1271. "[T]his statutory procedure effects a constitutional accommodation of the conflicting interests of the parties." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 607 (1974).

Plaintiffs who file notices of pendency also have significant interests. *See* Pet. App. 26a-27a. Unlike the plaintiff in *Doehr*, who "had no existing interest in Doehr's real estate when he sought the attachment," 501 U.S. at 16, plaintiffs who invoke article 65 are required to assert claims "affect[ing] the title to, or the possession, use or enjoyment of, real property," as the plaintiffs here did. C.P.L.R. 6501. In addition, while "there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment," 501 U.S. at 16, two of the petitioners here were about to engage in just such behavior: Diamond was about to sell her property, and Betesh had applied for a home equity loan. *See* Pet. App. 27a n.8. The third *Doehr* factor thus weighs heavily in favor of article 65's constitutionality.

4. Balancing these three factors, the court of appeals correctly concluded that article 65 is constitutional. The extensive protections that article 65 affords to property owners and the strong interests of

the State and claimants outweigh the relatively mild burden that notices of pendency may pose to property owners. Because the court of appeals' fact-specific ruling is correct, it does not warrant this Court's review.

C. This Case Is A Poor Vehicle For Addressing The Question Presented.

Even if the question presented here were otherwise worthy of this Court's review—and as explained above it is not—this case would be a poor vehicle for addressing it.

1. The narrow impact of this case does not merit this Court's review. Although petitioners assert that their due process argument has broad significance, their constitutional claims are in fact limited to the specific facts of their own cases. Petitioners initially raised a facial challenge to article 65, but they have never attempted to show that "no set of circumstances exists under which [article 65] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). As the district court properly noted, "[t]here are . . . many instances in which New York's lis pendens procedures would quite easily satisfy due process," such as when "a judgment creditor claiming an interest in real property filed a lis pendens against that property." Pet. App. 67a; *see also id.* at 28a, 41a. As a result, petitioners' only argument is that the court of appeals' careful, fact-intensive balancing of the *Doehr* factors was incorrect as applied to their unique situations.

In addition, as the court of appeals noted (Pet. App. 22a n.6), some of petitioners' allegations of harm are

implausible even under petitioners' interpretation of the facts, making their specific cases particularly poor candidates for further review.[4] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (allegations in a complaint must be plausible on their face). For example, although petitioners Diaz and Diamond allege that the notices of pendency affected their ability to alienate their properties, their other factual allegations suggest that the notices had little to no actual effect. Diaz sold his property "at a price somewhat below market value" but simultaneously obtained the discontinuation of the foreclosure proceedings against him. J.A. 199. Diamond also sold her property at a time and price she had negotiated before the notice of pendency was filed. *See* Pet. App. 37a. The only effect of the notice was to induce Diamond to put into escrow $100,000 from the sale of the property to cover her potential liability in the state-court lawsuit—money she could have retained in its entirety if she had prevailed in that lawsuit.[5] *See* Pet. App. 37a; J.A. 37, 294-295. Thus, in both cases,

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[4] While petitioners claim that there is "a rich district court record documenting the actual workings of . . . Article 65" (Pet. 24), their cases were dismissed under Federal Rule of Civil Procedure 12(b)(6) (Pet. App. 40a, 55a), and thus there is no "record," only untested allegations.

[5] After the state court granted summary judgment to plaintiff Jones (J.A. 83), Diamond ultimately settled the lawsuit due to "intense financial and emotional pressure" (J.A. 297) and allegedly paid Jones most of the money in escrow (Pet. 11). But the notice of pendency, which was canceled two years earlier under the escrow agreement (J.A. 55), cannot be blamed for Diamond's inability to defend herself against the state-court plaintiff's claims.

petitioners completed sales of their property, albeit with "some delay and compromise." Pet. App. 22a.

The harms alleged by Betesh—who did not attempt to sell his property—have little relationship to the article 65 procedures that petitioners challenge here. Betesh complains that he faced delays in attempting to remove the notice of pendency filed by his brother. *See* Pet. 14. But Betesh obtained a state-court dismissal of his brother's lawsuit within three months of so moving. J.A. 312. Betesh then filed a motion to cancel the notice (J.A. 313), but his counsel apparently did not follow up on the motion until more than a year later (J.A. 349-350). When Betesh's counsel did finally contact the Queen's County Clerk's office, that office confirmed that the notice was still in place but agreed to remove it "immediately." J.A. 350. Even if the delay in cancellation was unwarranted, it was not caused by any of the article 65 procedures challenged here.

2. This case is also an inappropriate vehicle for resolving petitioners' First Amendment claim that article 65 denied them access to the courts. *See* Pet. 33-35. For one thing, petitioners simply did not bring this claim below. As a result, the district court did not discuss this issue, and the court of appeals considered it waived. *See* Pet. App. 15a. Although petitioners now assert that they mentioned this issue in the district court (Pet. 33 n.11), they did so only in passing (*e.g.*, J.A. 30, 319-320), and in fact never raised a free-standing denial-of-access claim—for example, none of the causes of action in petitioners' individual complaints mentions such a claim. *See* J.A. 38-39, 143, 239-240.

Even putting waiver aside, petitioners' First Amendment argument fails because it rests upon an erroneous premise. Petitioners contend that property owners cannot raise constitutional challenges to article 65 in state court. But petitioners cite no state law or state-court decision to support this bald assertion. In fact, they concede that article 65 "does not explicitly prohibit homeowners from raising a constitutional challenge." Pet. 33. And the state courts have regularly considered other legal challenges to notices of pendency. *See, e.g.*, *Sakow*, 97 N.Y.2d at 443, 767 N.E.2d at 671; *Da Silva*, 76 N.Y.2d at 444-45, 559 N.E.2d at 1272; *5303 Realty Corp.*, 64 N.Y.2d at 315, 476 N.E.2d at 278. The only support that petitioners can muster is an allegation that the state-court judge in Diamond's case "refused to adjudicate any constitutional issue." Pet. 34. But Diamond apparently filed a state-court appeal "specifically flagging the constitutional issues" before settling the case. J.A. 132. She cannot now complain that she was denied access to the courts when she voluntarily abandoned her constitutional argument.

3. Finally, this case is a poor vehicle because petitioners probably have no live claims remaining, and thus this Court would have to resolve fact-specific jurisdictional questions before reaching the merits. Petitioners likely can no longer obtain injunctive or declaratory relief for two reasons. First, as the lower courts found, petitioners' claims for equitable relief are now moot because the notices of pendency in all three actions were ultimately canceled. *See* Pet. App. 13a n.3, 56a-57a. The court of appeals expressly declined to decide whether petitioners could invoke the narrow mootness exception for cases that are capable of

repetition yet evading review. Pet. App. 13a n.3. Second, in light of these cancellations, petitioners lack standing because they cannot demonstrate the "real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *see also Golden v. Zwickler*, 394 U.S. 103, 109 (1969). The most that petitioners can do is speculate that other property they own might, in the future, be subject to new notices of pendency from other creditors. *See, e.g.*, J.A. 297-298 (expressing concern that "[o]ther creditors" could file a notice on Diamond's "new house" and "could similarly pressure me into some sort of unfair settlement"). But such speculation is not sufficient to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

While the court of appeals presumed that petitioners still had live claims for damages (Pet. App. 13a n.3), that assumption also is questionable. As the district court found (Pet. App. 59a-60a), petitioners' damages claims against various state officials in their official capacities are not cognizable under § 1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), and in any event are barred by Eleventh Amendment sovereign immunity, *see Edelman v. Jordan*, 415 U.S. 651 663-66 (1974). This applies not only to the governor, attorney general, and comptroller, but also to the county clerks, who are deemed state officers when recording notices of pendency. *See Ashland Equities Co. v. Clerk of New York County*, 110 A.D.2d 60, 65, 493 N.Y.S.2d 133, 136-37 (1985).

Petitioners' damages claims against these officials in their individual capacities also likely fail because they

do not explain how the relevant officials had any personal involvement in allegedly unconstitutional actions. *See Parratt v. Taylor*, 451 U.S. 527, 537 n.3 (1981). The governor and attorney general had no direct involvement at all in the notices of pendency filed against petitioners. The comptroller and the county clerks[6] had some peripheral involvement (the comptroller collects fees from filings, and the county clerks record the notices), but they had no personal involvement in any of the allegedly inadequate procedures that form the gravamen of petitioners' due process claim. To put this point another way, even if a judgment in petitioners' favor here required *plaintiffs* to serve notices of pendency and *courts* to conduct more stringent probable-cause hearings, it would not alter the comptroller's and clerks' state-law obligations: the comptroller would still be required to collect fees, and the county clerks would still be required to record notices of pendency in the first instance.

Petitioners also cannot collect damages because respondents are entitled to qualified immunity. Petitioners claim injury from respondents' compliance with the state laws requiring recordation of notices of pendency. But "officials become liable for damages only to the extent that there is a clear *violation* of the statutory rights that give rise to the cause of action for damages." *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984) (emphasis added). Furthermore, in light of the precedents upholding notice of pendency statutes like article 65, respondents' compliance with article 65 did

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[6] Only Betesh—not Diamond (J.A. 31) or Diaz (Pet. App. 53a)—has sued the county clerk in her individual capacity.

"'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In short, quite aside from the merits of their arguments, petitioners likely cannot obtain either equitable relief or damages at this point, meaning that they have at best "an abstract injury" that does not give rise to federal jurisdiction. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974). These jurisdictional questions are themselves fact-specific and do not merit this Court's attention. Accordingly, any consideration of the constitutionality of notice-of-pendency procedures should await a case that does not present serious jurisdictional hurdles that may prevent the Court from reaching the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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